No. 12388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST VERNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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STATUTES

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BRIEF OF APPELLEE

JURISDICTION

The defendant was charged in an indictment containing two counts with violating Section 1461, Title 18, U.S.C. He was tried and convicted on both counts in the District Court for the Western District of Washington, Northern Division. The statutes au-

thorizing review by this court are set out on page 2 of appellant's brief.

STATEMENT OF THE CASE

In Count I of the indictment the defendant is charged with having knowingly mailed a lewd, lascivious and filthy letter to Milton Fardon. In Count II the defendant is charged with having mailed a carbon copy of the same letter to a Miss Evelyn Nelson. A photostat copy of the letter was furnished the appellant upon demand by way of bill of particulars. (T.R. 8). At the time of the trial, both of the letters were introduced in evidence. (Ex. 3, T.R. 73, Ex. 5, T.R. 98). The defendant admitted in a signed statement he had prepared and mailed the letters (Ex. 1, T.R. 105) and also admitted these facts upon being examined as a witness. (T.R. 212 and 213).

The letter which is alleged to be lewd, lascivious and filthy contains seven paragraphs plus a one-sentence postcript. The first two paragraphs explain the writer's past relationship with a certain named woman. In the third, ~~and~~ fourth and fifth paragraphs, the writer brags of his illicit sexual relations with the named woman and gives information as to her weakness for such. In the sixth paragraph, using the language

of the street, the writer praises the woman's ability in the performance of such activities and invites Milton Fardon to "be sure and get your share." In the last paragraph and the postcript the writer makes degrading remarks about the named woman and accuses her of sexual immorality.

The appellant was a stranger to both of the recipients of the letter, having neither met nor had any prior communication with either.

QUESTIONS RAISED

The appellant raises two questions on appeal.

1. Are the letters lewd, lascivious and filthy within the meaning of the statutes?

2. Is the effect of such a letter upon a recipient material to the issues raised in the indictment?

SPECIFICATIONS OF ERROR

The appellant sets out four specifications of error in his brief on pages 4 and 5. The first three are directed to the first question above stated and the fourth is directed to the second question above stated.

ARGUMENT

1. ARGUMENT ON SPECIFICATIONS OF ERROR 1, 2 and 3.

SUMMARY

The tenor of the entire letter is offensive to the common sense of decency and modesty of the community and tends to suggest immoral thoughts. The sixth paragraph of the letter being an invitation to Milton Fardon to engage in illicit sexual relations with the named woman is clearly within the letter and spirit of the statute and the interpretation thereof by the courts. The recipients of the letter being strangers to the appellant, there can be no claim of privilege merely because the envelopes were sealed.

ARGUMENT

In arguing the first three specifications of error, the appellant states that one of the recipients of the letter, Milton Fardon, was 43 years old, had served as a policeman for 20 years in New York City and had been married for 13 years but is now divorced. Appellant also states that the other recipient, Mrs. Evelyn Nelson, was a secretary to an employer and had been married for two years.

Apparently, the appellant either seeks to con-

vince this court that persons who have had such experiences are incapable of being further debauched and corrupted or that they are so high minded that no amount of lewd and lascivious literature could ever corrupt and debauch their minds and morals. Neither proposition has any merit. Nor does the appellant's previous good character or emotional strain in any way alter the crime committed by him. The only issue to be decided is whether the jury was entitled to find, as it did, that the letter was in fact lewd, lascivious and filthy as defined by Section 1461, Title 18, U.S.C. The authorities which will be hereinafter cited are in accord on the proposition that language which is calculated to corrupt the minds and morals is lewd, lascivious and filthy within the meaning of this statute. Paragraph 6 of the letter encourages and invites Milton Fardon to indulge in illicit sexual relations with the named woman. It is difficult to conceive how language could more clearly fit the Supreme Court's definition of lewd, lascivious and filthy than that used in this sixth paragraph.

Appellant seeks to justify the sending of the letters through the mail as a privileged communication merely because the envelopes in which the letters were placed were sealed. The appellant was a complete stranger to both of the recipients of the letters.

Nowhere in the record or in the appellant's brief is there any explanation as to how such privilege could be established. The appellant cites the case of *Swearingen v. United States*, 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765. In that case the lower court found as a matter of law that the language was obscene, lewd and lascivious, and allowed the jury to only determine the questions of whether or not the defendant had knowingly mailed the paper in question. The Supreme Court held that the particular language which was used was not a matter of law, lewd and lascivious, then defined the meaning of those words in the following language:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails for delivering matter to corrupt the morals of people. The words 'obscene', 'lewd' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity and have the same meaning as given them in common law for prosecutions for obscene libel."

The whole tenor of the letter in the case at hand is to invite Milton Fardon or anyone else into whose hands the letter might fail to engage in illicit sexual relations with the woman named in the letter. This is exactly the type of thing the Supreme Court has stated the statute is designed to punish and prevent.

In *United States v. Limehouse*, 285 U.S. 424, 52

S. Ct., 412, 76 L.Ed. 843, the Swearingen case is approved in the following language:

> "In *Swearingen v. United States*, decided in 1896, the indictment was under Revised Statutes Sec. 3893, which made unmailable only 'obscene, lewd, or lascivious' matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not 'calculated to corrupt and debauch the mind and morals of those into whose hands it might fall' and induce sexual immorality. 161 U.S. at 451."

On December 28, 1949, the Court of Appeals for the Ninth Circuit, in a very learned decision, considered and defined the words "lewd" and "lascivious" in the case of *Burnstein v. United States.* The opinion in this case approves the following two instructions which were given by the lower court as being the rule in the Ninth Circuit:

> "Matter is obscene, lewd, or lascivious, within the meaning of the quoted statute, if it is offensive to the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the publication charged to have been obscene was in fact of that character, and if it was, and the defendant knew its contents at the time he deposited it in the mail, it is not material that he, himself, did not regard it as obscene.

> "You are instructed that the words 'obscene, lewd, or lascivious', as used in the statute from which I have just quoted to you, have the meaning of that which is offensive to chastity and modesty. They mean that form of indecency which is calculated to promote the general corruption of morals. The true test to determine whether a writing is non-mailable as obscene, lewd, or lascivious is whether its language has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

The two letters which the appellant herein deposited in the mails clearly fall within the definition of "lewd" and "lascivious" as set out in these instructions. The tenor of the entire letter has a tendency to deprave or corrupt the morals of those whose minds are open to such influences.

The appellant's contention that the letter was privileged merely because it was mailed in a sealed envelope will now be considered. The appellant cites *United States v. Dennett*, 39 F. (2d) 564 (D.C.A. 2) 1930, and quotes the following from the decision therein:

> "In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidently or surreptitiously, as they might see some medical books which would

> not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper."

The publication which was being considered in that case was a pamphlet on sex education. The letter in this case can in no wise be considered justified as an educational manuscript.

The appellant further cites *United States v. Wroblenski*, 118 Fed. 495. The first sentence of the quotation from that case clearly distinguishes it from the case at hand, "If it were a publication or matter sent to a young person or to a *stranger* I am not sure that these definitions would exclude the language or suggestion of the letter." (Italics supplied).

In the case at hand, the persons to whom the letters were sent were total strangers to the appellant. Therefore, the Wroblenski case is not in point at all.

The appellant's first specification of error: "The District Court was in error in overruling the defendant's motion for dismissal of the indictment" is not specifically urged in the appellant's brief. Although the record does not specifically show that the appellant's motion to dismiss the indictment was overruled, such is the fact. This, of course, is evidenced by the fact that a trial was had. There can be no

honest dispute that the wording of the indictment does not state a crime.

The second and third specifications of error are challenges to the sufficiency of the evidence at the close of the Government's case and again at the close of all the evidence. As the authorities cited herein clearly hold, it was incumbent upon the trial judge to submit the case to the jury, under proper instructions. There has been no challenge to the instructions. The reason for this undoubtedly lies in the fact that the trial judge gave virtually all of the instructions requested by the appellant as well as those which are indicated by the cases decided in the Supreme Court of the United States. The appellant having openly admitted all elements of the crime except the averment that the letter was lewd, lascivious and filthy, the only real question for the jury to determine was whether or not the letter fell within such definitions. The jury having decided this question against the appellant, it would not be proper to set aside that verdict.

2. ARGUMENT ON SPECIFICATION OF ERROR No. 4.

SUMMARY

The proper test of whether or not language is lewd, lascivious and filthy is whether or not it is

calculated to corrupt and debauch the minds and morals of those into whose hands it might fall. This test is to be applied by the jury considering the language itself. The question of whether or not the minds of the recipients of the letter were actually corrupted and debauched is therefore not a material issue in this case.

ARGUMENT

In the fourth specification of error the appellant contends that the court erred in refusing to allow the appellant to cross-examine each of the recipients of the letter on the question of whether or not their minds and morals were debauched and corrupted by virtue of having read the letter. The appellee contends the evidence sought to be proven by appellant is not material and that the trial judge committed no error in so refusing to allow the appellant to proceed in this manner.

In Specification of Error No. 4, the appellant sets out an offer of proof as to the reactions of Milton Fardon upon receipt of the letter. Appellant, by such proof, sought to introduce evidence that the mind and morals of Milton Fardon had not been corrupted, depraved or debauched by reason of having received the letter. The appellant, by so doing, sought to con-

vince the jury that, since the recipient of the letter had not been harmed, no crime had been committed.

If the appellant's theory were followed, then anyone could mail lewd, lascivious and filthy matter with impunity to a person whose mind and morals were already debauched to the maximum. Likewise, under the appellant's theory there would be no crime if one were to mail lewd, lascivious and filthy letters to a person who was so high minded and whose moral fiber was so strong that no amount of such literature could corrupt and debauch his mind or morals.

The statute which the appellant is accused of having violated prohibits the use of the United States mails for transmitting lewd, lascivious and filthy letters. The issue to be decided by the jury was whether or not the particular letter in this case was lewd, lascivious and filthy. The definitions of these words have been defined by the Supreme Court and by this Court. These definitions were given to the jury in the instructions. The opinion of the recipient of such a letter is not material on the question of whether or not the letter is actually lewd, lascivious and filthy. It is therefore, the appellee's contention that such evidence as the appellant sought to present is not competent or material and the trial judge correctly excluded such evidence.

Further, according to the appellant's theory, a defendant charged with violating Section 1461 could never be convicted unless the recipient of the objectionable letter took the stand and testified that as a result of having received the letter his mind and morals had become debauched and corrupted.

In *Rosen v. United States*, 161 U.S. 29, 16 S. Ct. 434, 40 L.Ed. 606, the court stated as follows:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, chastity in social life, and what must be deemed obscene, lewd, and lascivious."

See *Magon v. U. S.* (9 Cir.) 248 F. 201, to the same effect.

Since the sender's opinion as to whether or not language is lewd and lascivious is not the proper test under the statute, then how can the recipient's opinion be of any probative value in determining the question involved.

In the case of *Burnstein v. United States* decided by the Court of Appeals for the Ninth Circuit on December 28, 1949, the defendant used the mails for circulating an advertisement as to the contents of an obscene book. Certainly, no one would have ordered the book from the defendant unless they had a desire to read it. No one who ordered and read the book testified that their morals and minds had been corrupted and debauched, yet this court sustained the conviction.

In the Burnstein case this court ruled that the jury had the responsibility of determining whether or not the language used in the writing was offensive to the common sense of decency and modesty of the community. The case further holds that it is not material whether the sender himself regarded the language as objectionable under the statute. It being the jury's duty to determine such questions under proper instructions, it would likewise be immaterial whether the recipient considered the language nonmailable within the definition set out in the statute.

In the case of *United States v. Musgrave*, 160 Fed. 700, the defendant sought to defend upon the same ground as the appellant contends here, that is, that unless the recipient's mind and morals were corrupted and debauched no conviction could stand. The Court stated on page 704:

> "To sustain the contention of defendant would necessarily require the court to insert in the act an exception which Congress has failed to make. It would necessitate in almost every case a determination of the moral or mental condition of the addressee of every obscene matter sent through the mails, and, as stated by the assistant district attorney, 'the jury would have to determine in every case whether the mind of the receiver of the letter could be corrupted, and an acquittal would result if the addressee were a woman of the town, were insane, were so high minded as not to be influenced by letters of this character, were of such immature years as not to understand the import of the words, were so depraved that he could sink no lower.' A prostitute's mind, or that of a degenerate, may not be open to any immoral influences, and the receipt of a lascivious or lewd letter, book or picture may not corrupt their minds because they are beyond such influences. Would that fact be a defense to a prosecution under this statute? Would the fact that a person, while away from home, purchases a lascivious book or picture, and sends it through the mails addressed to himself at his home, exempt him from prosecution under the statute? Clearly not. Or if publishers of such literature should use the mails for the purpose of sending it to retail dealers, who may have no intention of reading it,

> and whose minds for this reason could not be corrupted, but merely sell it, could it be successfully claimed that such acts would not be violative of the statute? Congress has prohibited the sending of lottery tickets through the mails. Can a husband send such a ticket to his wife through the mails and still not be amenable to the law, or send to his wife an article intended for the purpose of preventing conception or procuring an abortion, which is prohibited by the same act? In the opinion of this court the language used clearly and convincingly shows that the intent of Congress was to prevent the abuse of a great privilege granted by a magnanimous government for the purpose of promoting the welfare and intelligence of its people, and not permit it to become a 'vehicle for the transmission or circulation of mental filth'."

And on page 706 the opinion states:

> "Applying these rules, it clearly appears that the object of Congress in enacting the statute was to absolutely prohibit the use of the mails to all persons for the transmission of matters which are lewd, lascivious, or indecent. It matters not what the relationship between sender and sendee is, or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try the case, have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute."

The Musgrave case was cited with approval by the

9th Circuit Court of Appeals in *Magon v. United States*, 248, Fed. 201.

In the case *United States v. Bebout*, 28 Fed. 522, the court stated:

> "The statute does not make the publication of obscene and indecent matter an offense. It consists in using the United States mails for its circulation. It is not designed or intended to prohibit the publication of obscene matter, but only to prohibit and prevent its circulation through the mails. Nor does the statute make a purpose or intent to deprave or demoralize the public, or injure individuals, an ingredient to constitute the offense. Nor does the truth or falsity of the publication make any part of the offense; the only inquiry being, was the publication obscene or indecent, and was it placed in the mails for circulation in violation of the statute?"

CONCLUSION

The indictment having stated a violation of the statute, and the evidence adduced at the trial, which, if believed, being sufficient to sustain the charges in the indictment, the Court committed no error in overruling the appellant's motion to dismiss the indictment nor in overruling the appellant's motions for a judgment of acquittal. The question of whether or not the language in the letter was lewd, lascivious and filthy, being an issue to be decided by the jury under proper instructions, the actual effect of such a letter upon a recipient is not material to the issues of the case, and the court made no error in excluding such evidence.

Respectfully submitted,

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